MACDONALD, FITZGERALD & MACDONALD
ATTORNEYS AND COUNSELORS
PROFESSIONAL CORPORATION
SUITE 200 PATERSON BUILDING
653 SOUTH SAGINAW STREET
FLINT, MICHIGAN 48502

REPRESENTING INJURED WORKERS OF MICHIGAN
SINCE 1938

R. DUNCAN MACDONALD
TIMOTHY J. MACDONALD
ROBERT J. MACDONALD

ROBERT J. MACDONALD (1914-1987)
JOHN J. FITZGERALD (1919-1995)

TELEPHONE
(810) 232-3184

FACSIMILE
(810) 232-9632

November 8, 2011

RE: HB 5002 Bill to Reform the Michigan Workers' Disability Compensation Act

Dear Senators:

In recent years, the Michigan Supreme Court has made it extremely difficult for an injured worker to prevail in a workers' compensation case. In 2011, it has been widely reported that not a single injured worker has been awarded workers' compensation benefits by Detroit magistrates (who handle all cases arising out of Wayne, Macomb, Monroe, and Washtenaw counties) because of the extreme burden of proof placed on injured workers established by the Supreme Court in its 2008 *Stokes v DaimlerChrysler*[1] case.

It is particular distressing to learn that, at such a time when virtually no benefits are being awarded anywhere in the State, that the insurance industry, and its front groups, have been lobbying to pass legislation to dilute even further the rights of injured workers. HB 5002 unfortunately does just that. (The special interests lobbying for the bill have disingenuously described the bill as a codification of existing Supreme Court precedent; such an assertion is a gross distortion of the truth.) HB 5002 would serve the purpose of allowing workers' compensation insurance carriers to pocket millions of dollars in workers' compensation premiums they have received, but the bill will radically shift the cost of caring for injured workers to taxpayers when most injured workers are forced to turn to Medicaid, state disability assistance, and general assistance when their workers' compensation claims are denied. HB 5002 would also institutionalize a new practice that would require both an employer and employee to each hire vocational experts for several thousand dollars in every single workers' compensation case in order to determine the amount of benefits payable. HB 5002 would drastically increase the burden on Michigan taxpayers and impose completely unnecessary and significant new costs on Michigan businesses and employers.

Workers' compensation carriers are not in need of a bailout. Former Workers' Compensation Bureau Director Professor Ed Welch of Michigan State University's School of Labor and Industrial Relations reports that workers' compensation insurance has become over the past decade a very lucrative line of insurance to write in Michigan. Current Michigan Workers' Compensation Agency Director Kevin Elsenheimer reports that due to declining liabilities, workers' compensation premium rates will drop in the state an average of 7.4% for the year. Rates also declined 1.9% and 3.1% in the

[1] 481 Mich 266, 750 NW2d 129.

preceding two years. Pete Kuhnmuench, the director of the Insurance Institute of Michigan, informed the House Insurance Committee recently that Michigan's per-claim cost is actually 35% lower than the median costs of workers' compensation claims in other states. While the Act as written is currently cost-friendly to Michigan's employers, HB 5002 would dramatically increase costs by institutionalizing a new practice that would require both an employer and employee to each hire vocational experts for thousands of dollars in every single workers' compensation case in order to determine the amount of weekly benefits payable. HB 5002 would drastically increase the burden on Michigan taxpayers and impose completely unnecessary and significant new costs on Michigan businesses and employers.

Michigan's Current Workers' Disability Compensation Act

Michigan passed a workers' compensation statute initially in 1912. Since the beginning, the Michigan workers' compensation statute has essentially provided weekly wage loss benefits to an injured worker if that worker has not been able to work within his or her qualification and training as a result of injury and no light duty work is available. Since 1982, an injured worker receives 80% of his after tax average weekly wage at the time of injury, but not more than 90% of the state average weekly wage. A worker's benefits do not increase to reflect costs-of-living adjustments. An injured worker is also entitled to potentially lifetime medical care for his injuries. A worker has a right to select a physician of his or choice for his care 10 days following the injury, and a procedure exists for an employer to challenge that selection. Michigan reformed the workers' compensation system several times in the 1980's and significantly reduced workers' compensation costs for employers by permitting an employer to reduce worker's compensation benefits by other benefits a worker receives like unemployment, sick leave, pension and Social Security benefits.

HB 5002: Constitutional?

It is important to understand the role of workers' compensation in our legal system. For hundreds of years in Anglo-American legal systems, an injured worker could bring a lawsuit against his employer if a worker sustained an injury through his employer's negligence and in that lawsuit, an injured employee could recover monies for lost wages, medical care, pain and suffering and other damages resulting from the injury. In the nation's first big wave of tort reform, workers were forced to give up the right to sue for damages including money for pain and suffering in exchange for small, certain, disability benefits, medical care and retraining benefits that were promised to be paid promptly without prolonged litigation. Every state in the Union ultimately adopted a workers' compensation statute, but it was hotly debated whether the workers' compensation statutes were a constitutional violation of due process in part because workers gave up such significant rights that ordinary Americans generally have when injured through another person's negligence. Ultimately, the courts ruled that many workers' compensation systems survived constitutional challenge because there was enough quid pro quo that workers generally gained in workers' compensation systems by receiving prompt disability payments without litigation that could provide a means of support to the injured worker and his family. HB 5002 would destroy that constitutional balance.

HB 5002 will Threaten Benefits for Disabled Workers Absent Due to a Work Injury

HB 5002 would institutionalize harassment and discrimination against injured workers in the workplace. It would turn many worker's compensation cases into wrongful discharge cases. HB5002 proposes language that if an injured employee is terminated "for fault" from a job following injury, that worker loses his or right to receive workers' compensation benefits. If HB 5002 passes, some employers will try to write up and discipline their injured workers for every minuscule offense imaginable in order to create a paper trail to justify the ultimate discharge from employment and termination of workers' compensation rights. Under HB5002, if a worker is absent from work due to a work injury, employers will find their injured workers 'at fault' for violating attendance policies, fire their workers and argue that workers' compensation benefits cease because of the employee's faulty attendance. Alternative compromise language to deal with this issue was presented to a House Commerce Committee workgroup. It was recommended instead that the Legislature adopt language from *Porter*, an older Court of Appeals case so that "benefits shall be suspended if a worker is discharged for egregious misconduct which consistently results in the discharge of other employees and that discharge is not connected in any way to the work injury." Legislators at this meeting seemed receptive to making this amendment, but for reasons that remain unclear, the amendment did not appear in the final substitute bill submitted to the Committee for a vote. The Senate must take action to fix this problem.

HB 5002 will Punish Workers who Return to Light Duty Work Assignments

HB 5002 would also create a presumption that a worker is not entitled to full wage loss benefits if the worker returns to some kind of employment for more than 100 weeks. Under such a rule, if an employee herniates a disc in his back, returns to work on light duty, but ultimately his symptoms flare up again so he requires surgery, the employer or its insurance carrier will refuse to pay weekly benefits when the injured worker goes off for surgery based upon the statutory language that the claimant has a new wage earning capacity. Such a presumption is particularly cruel for an injured worker who has done his best by attempting to work despite his ongoing pain and limitations. For a worker who came back to light duty for 250 weeks or more, HB 5002 would act as a complete and total bar to any future benefits.

HB 5002 will Deprive Workers of Medical Care and Shift Costs to Taxpayer-Funded Medicaid

In 1963, Governor George Romney asked my grandfather, former State Senator Robert J. MacDonald, to serve on his Workers' Compensation Study Commission. The major thing my grandfather pushed for while serving on that commission was the right of an employee to treat with a physician of his or her choice. The medical community fought for that right. Under the old system, injured workers did not have the benefit of a true patient-physician relationship where doctors candidly relayed information to their patients and patients could not trust their doctors. Under the old system, workers would often treat with their own doctor anyway, in addition to the company's doctor, and they would incur significant medical bills that would go unpaid or push the injured worker

towards bankruptcy. HB 5002 would turn back the clock and take away a worker's right to treat with a physician of his or choice for the first 45 days following an accident. Such a rule will inevitably drive up the costs to taxpayers as Medicaid, Medicare, Blue Cross and county health plans as they get stuck paying the bills that workers' compensation carriers properly should.

For over thirty years, if a workers' compensation carrier refuses to pay reasonable and necessary medical expenses related to a work injury, the worker's compensation carrier runs the risk of having to pay an attorney fee to the injured worker's attorney for having to pursue payment in a trial. HB 5002 would eliminate the possibility that the insurance company may have to pay an attorney fee regarding unpaid medical bills. As a practical matter, attorney fees on medical bills have rarely been awarded, but the threat of having to pay attorney fees often gets the bills paid without a trial. HB 5002 would eliminate the economic incentive for an attorney to assist an injured worker in getting his or her medical bills paid. As a result, injured workers will turn to Medicaid and county health plans to get these bills paid and pass on these costs to taxpayers.

HB 5002 Discriminates Against Older Injured Workers by Depriving Them of Benefits

The current Michigan workers' compensation act already discriminates against older workers. HB 5002 would punish older workers even more. Under the current law, an older worker drawing Social Security Retirement Benefits who has taken a part time job to help make ends meet may very well receive no weekly wage loss benefits if he or she is injured on the job. Any workers' compensation benefits payable will be reduced by half of that worker receives in Social Security Retirement. I recently represented a sweet elderly woman who took a part-time minimum wage job working retail who hurt her back on the job. Had we taken her case to trial, she would have won **no** weekly benefits because half of her Social Security Retirement benefits exceeded 80% of the after-tax value of her average weekly wage.

HB 5002 is even more draconian. Under this bill, if an injured worker is simply eligible for "normal retirement," workers' compensation benefits will be reduced by that pension amount even if the worker has not retired. Under such a scenario, an employee eligible for a pension can see his or her workers' compensation benefits wiped out because he could in theory sign up for his pension–even though that employee plans to work another decade and only needs to be off work for 6 months for a minor surgery.

HB 5002 will Cost Employers Thousands of Dollars in Unnecessary Litigation Costs Every Time an Injured Worker is Injured on the Job.

While the changes described already would be cruel to workers, and increase the burden on the state's budget, the most radical change recommended in HB5002 would be elimination of the constitutional wage loss replacement system created by the Michigan legislature in 1912. Since its inception, Michigan's workers' compensation system has required an employer or its insurance carrier to pay an injured worker, unable to do work within his qualifications and training, a percentage of his lost wages unless the worker has been offered a job he or she can perform.

The insurance industry has been lobbying in the legislature and in the courts to change this system for a number of years. Until the last decade, a workers' compensation magistrate would decide disputed cases generally by reading the medical opinions of the treating and examining doctors, hearing about the claimant's past work from the claimant and company personnel, as well as hearing about any light duty job offers that had been made to the employee. The insurance industry has been arguing that it ought to instead be able to call as witnesses "vocational experts" who can testify about the functional requirements of various jobs that exist in the universe and argue that because such jobs exist somewhere, claimants should not be entitled to any benefits even though there is no proof that such jobs are actually available to the claimant.

The Michigan Supreme Court partially endorsed this new expensive use of vocational experts in its 2008 *Stokes v DaimlerChrysler* decision. Since that decision, each employee and each employer increasingly feel pressured to typically spend thousands of dollars to hire a vocational expert to identify all of the jobs in the universe the claimant was qualified and trained to do before his or injury and to offer a so-called expert opinion as to whether there any such jobs the claimant has the capacity to perform despite his work injury at his previous earnings level. Without such expert testimony, magistrates increasingly indicate they do not feel like a claimant can prove his entitlement to benefits under the *Stokes* standard, or that an employer can defeat such a claim.

To make matters worse, the insurance industry has also been arguing that it should be able to reduce a claimant's weekly workers' compensation benefits if a vocational expert provides an opinion that are lesser paying jobs somewhere in the universe that an injured worker can perform, even if no such job has been offered or made available. The Supreme Court has recently been toying with the idea of permitting such a radical change to the law–even though the Michigan Supreme Court clearly rejected these arguments in a number of cases decided in the 1930's.[2]

If every injured workers' benefits in the state can be slashed by $300/week because a vocational expert is willing to prepare a report stating that there are relatively non-physical jobs existing somewhere that pay $300/week (but that aren't actually offered to the claimant), every injured worker in the state will face unprecedented financial disaster. Such workers will be applying for general assistance, state disability assistance–and this will blow a hole in the State's budget.

HB 5002 would embrace this radical change to the Michigan workers' compensation act by redefining how benefits are calculated for the 'partially disabled' worker. Michigan has always had a wage loss replacement workers' compensation statute. By requiring employers to pay wage loss benefits or offer an injured worker a job, Michigan's system has worked effectively in bringing workers back to meaningful productive work quickly following an injury. Allowing benefits to be reduced because of the existence of jobs *somewhere* would eliminate this incentive and dramatically increase Michigan's unemployment rate. (Some states instead pay workers' compensation benefits

---

[2] For more detail, see my chapter, "Worker's Compensation Cases" in the Michigan Basic Practice Handbook, 6th edition, published by the Institute of Continuing Legal Education.

based upon the claimant's medical impairment. In those 'medical impairment' states, workers get certain benefits regardless of their return to work. Michigan workers don't get such benefits (except for amputations or the functional equivalent thereof); the constitutional tradeoff has been that they get wage loss benefits instead if the worker suffers lost wages.

Under the system advocated by the insurance industry in HB 5002, every work injury in Michigan would have to be litigated in order to determine the claimant's benefit amount. Every injured worker, and every employer, would have to retain lawyers and vocational experts who would testify regarding the claimant's wage earning capacity. This system is already being created because of Michigan Supreme Court's decision in *Stokes*. These increased litigation costs will eventually start driving up the costs of workers' compensation premiums. HB5002 would embrace this change by ensuring that these litigation costs for employers and employees skyrocket.

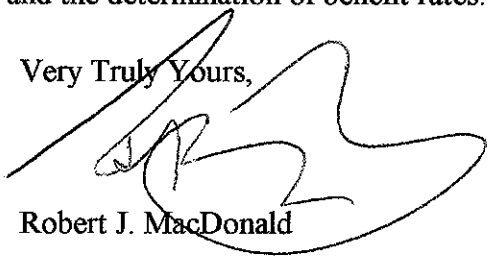
In the latest version of HB 5002, an insurance carrier can reduce a worker's benefits if there is work "reasonably available to the employee." The final legislation needs to be clear that an injured police officer, hospital physician or CEO--while they are lying in a hospital bed--are not required to apply for marginal work as a telemarketer or required to sell apples on a street corner, just in order to get their full weekly workers' compensation checks. Nor should such workers, when they are released from the hospital, be required to quit their jobs, give up their pensions and employee healthcare and go roaming the streets begging for pocket change in new marginal employment, as a condition to receiving workers' compensation. If the language in the current bill is not fixed, some insurance adjusters will read the want-ads and identify jobs he or she thinks an injured worker could do, and reduce benefits by what those jobs pay, without even sending a list of the jobs to the worker. A worker will try to learn what those jobs are, apply for them, and when they don't get hired, the worker will wait two years for a hearing before a magistrate to prove that the jobs were not "reasonably available" in order to get their full unreduced workers' compensation checks reinstated. Under the current law, benefits can terminate, if a job offer is actually made and refused. Under the current law, a partially disabled worker can be required to participate in vocational rehabilitation efforts that will restore that worker's earning capacity in a new occupation. If a worker refuses to do so, benefits can be suspended. The longstanding formula for calculating benefits for disabled workers reduces benefits for actual wages earned--and not because of phantom wages a worker has never been offered. This clear formula is fairer to workers, and significantly less expensive and litigious to administer, than the ideas proposed in HB 5002.

The State Bar of Michigan's Workers' Compensation Section Council, composed of both employer and employee representatives, has already been talking about the unnecessary costs associated with the *Stokes* decision and brought forward alternative proposals to the legislature to reduce costs to address these issues. HB 5002 would instead institutionalize and embrace the expensive use of vocational experts and the slashing of benefits to the unemployed injured worker.

HB 5002, as written will be a financial windfall for vocational experts and workers' compensation carriers, but it would be devastating to injured workers, costly to Michigan employers and extremely burdensome on Michigan taxpayers. There are significant problems with unnecessary

costs and delays in today's Michigan workers' compensation system. While I do not doubt that the sponsors of this bill are well-intentioned in their efforts to improve Michigan's business climate, this bill as written will unnecessarily drive up costs. It is imperative that you amend this bill by adopting the alternative proposal put forward by the State Bar of Michigan's Workers' Compensation Section Council regarding the definition of disability and the determination of benefit rates. I remain

Very Truly Yours,



Robert J. MacDonald